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In the Supreme Court of the United States

OCTOBER TERM, 1970

70-139

WILLIAM ALOISIO and STANLEY JASINSKI

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, William Aloisio and Stanley Jasinski, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 10, 1971.

OPINIONS BELOW

The judgment of conviction and sentence of the United States District Court for the Northern District of Illinois is not officially reported. The opinion of the United States Court of Appeals for the Seventh Circuit entered on March 10, 1971, has not yet been officially reported. It is attached as an appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the district court was entered on March 10, 1971. A Petition for Rehearing en Banc was timely and denied on April 9, 1971. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does the conspiracy exception to the hearsay rule as heretofore applied in federal courts violate the Sixth Amendment's Confrontation Clause as interpreted in *Douglas* v. *Alabama,* 380 U.S. 415 (1965), and *Bruton* v. *United States,* 391 U.S. 123 (1968)?

2. Does the judicial presumption implicit within the limiting instructions pursuant to the conspiracy exception to the hearsay rule fail to meet the constitution standard for such presumption as announced by the Court in *Leary* v. *United States,* 395 U.S. 6 (1970)?

3. Can a Government witness, as distinguished from a defendant (*Cf. Harris* v. *New York,* ..... U.S. ....., 8 CRL 3139) invoke his Fifth Amendment privilege against self-incrimination to limit a defendant's Sixth Amendment right to confrontation as interpreted by *Alford* v. *United States,* 282 U.S. 687?

4. Where the constitutionality of defendant's arrest first becomes an issue on appeal due to an interceding United States Supreme Court opinion (*Davis* v. *Mississippi,* 394 U.S. 72) can the court of review determine the constitutionality of such arrest, absent an evidentiary hearing, in violation of the principles announced in *Morales* v. *New York,* 396 U.S. 102 (1969), or must this be a reversal pursuant to *Jackson* v. *Denno,* 378 U.S. 368 for a hearing on the constitutionality of defendant's arrest?

Constitutional Provisions Involved

Fourth Amendment provides that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.

Fifth Amendment provides that "No person shall . . . be compelled in a criminal case to be a witness against himself . . ."

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

Statement of the Case

An 8 count indictment was returned on July 3, 1968, charging defendant and 7 others with conspiracy to make, forge and counterfeit U.S. treasury notes, and with conspiracy to possess, pass and sell the counterfeit notes (J.A. 1-3).* Of the 7 remaining substantive counts, defendant was charged in count 3 with possessing 1 counterfeit $10,000 note on January 16, 1968, in violation of 18 U.S. Code 474 (J.A. 1); in count 4, along with William Aloisio, Grace Cosentino and Nimrod T. Solomon, with possessing 99 $10,000 counterfeit notes on January 22, 1968 (J.A. 1-2); count 5 charged Jasinski, with Aloisio, Cosentino and Solomon with buying, selling, receiving and delivering 99 counterfeit $10,000 notes on January 22, 1968 (J.A. 2), and count 6 charged that he with Aloisio, Cosentino and Solomon possessed 99 counterfeit $10,000 notes on January 22, 1968, with intent to sell (J.A. 6).

Count 1 charged defendants Clinton Davison and Edward Murray with possession of 1 $10,000 counterfeit note

* "J.A." refers to Joint Appendix of Record filed herein.

on January 15, 1968 (J.A. 1); count 2 charged Bartoli, Davison, Murray and Norman P. Carter with falsely making and forging 99 counterfeit $10,000 notes on January 19, 1968 (J.A. 1) and count 7 charged defendant Charles Bartoli with possessing 1 counterfeit $10,000 note on January 20, 1968. (J.A. 2)

Of the defendants, Cosentino's trial was severed, Clinton Davison entered his plea of guilty on the day of trial (J.A. 5), and he became the first government witness (Tr. 103).* Carter was found not guilty. All of the other defendants were found guilty as charged in the indictment. Solomon, Bartoli and Murray were sentenced to 10 years (J.A. 7-8). Aloisio and Jasinski were sentenced to 5 years (J.A. 8). Davison was placed on probation (J.A. 8).

By appropriate motions Jasinski moved for directed verdicts of not guilty. (J.A. 6, Tr. 1765). Various motions for mistrial and for severance were denied.

(The facts generally are set out in full in the opinion of the Court, which is sought to be reviewed, and those facts specifically relevant to the Constitutional violations alleged are set out in detail within the reasons for granting the writ, and are incorporated herein.)

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* "Tr." refers to original Transcript of Proceedings as filed herein.

Reasons For Granting Writ

1. The conviction of petitioner Aloisio was based almost exclusively upon evidence admitted under the conspiracy exception to the hearsay rule and thereby violates the Sixth Amendment Confrontation Clause as interpreted in Douglas v. Alabama, 380 U.S. 415 and Bruton v. United States, 391 U.S. 123.

The Government's evidence as demonstrated by the opinion of the Court of Appeals is totally devoid of any substantial evidence of any criminal conduct on the part of defendant Aloisio, other than statements of one Grace Cosentino implicating defendant, which were held to be admissible against defendant upon the special rules of evidence applicable to conspiracy prosecutions. This court has granted certiorari in *Bostic* v. *United States,* No. 5250 O.T. 70. One issue there is:

> "Does the conspiracy exception to the hearsay rule as heretofore applied in federal courts violate the Sixth Amendment's Confrontation Clause as interpreted in Douglas v. Alabama, 380 U.S. 415 (1965), and Bruton v. U.S., 391 U.S. 123, 3 CrL 3085 (1968)?"

Here, as in *Bostic,* the conviction was based upon the admission of evidence normally inadmissible because of its being highly prejudicial and being in violation of the right of confrontation. It was admitted based upon the exception permitted in conspiracy prosecutions.

The special evidentiary rules in conspiracy cases are unconstitutional. Essential to the conviction where otherwise inadmissible evidence is admitted under the conspiracy exception, is the "judicial presumption" that the jury can abide by certain limiting instructions. Introduced in evidence were statements of alleged co-conspira-

tors. Except for the unique rules governing conspiracy, such hearsay evidence would not be admissible. *Bruton* v. *United States,* 391 U.S. 123. The court attempted to remove the normal prejudice flowing from the admission of such "hearsay" by giving to the jury instructions which attempted to limit the jury's consideration of such evidence. (Tr. 2136-7)

These instructions require the jury to hear the evidence damaging to defendant, but remove it from their minds in regard to certain determinations, and then consider the evidence for other determinations. Permitting the introduction of such evidence and then attempting to remove the effect of such prejudicial evidence by instructions, is based on the presumption that the jury can follow such instructions. In *Leary* v. *United States,* 395 U.S. 6, 23 L. ed. 2d 57 the court considered the constitutionality of "criminal statutory presumptions." No sound reason exists that "judicial criminal presumptions" should not be judged by the same standard. In *Leary,* the court stated "that a criminal statutory presumption must be regarded as 'irrational or arbitrary' and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Similarly, the presumption that the jury will abide by the limiting instruction is arbitrary unless it can be said with substantial assurance that the presumed fact, i.e., that the jury will and can abide by such instruction in conspiracy cases, is more likely than the recognized fact, that a jury cannot departmentalize its mind and will in all probability consider evidence highly prejudicial to defendant when such evidence is statements of co-defendants. *Bruton* v. *United States,* 391 U.S. 123, 20 L. ed. 2d 476; see also *Jackson* v. *Denno,* 378 U.S. 368, 12 L. ed. 2d 908.

In *Bruton,* the court held that the jury cannot abide by an instruction not to consider against defendant a co-defendant's statement implicating defendant. The court relied upon its prior findings in *Jackson* v. *Denno,* that juries can not wipe from their mind, or limit their consideration, of highly prejudicial evidence.

The presumption that the jury in conspiracy cases can function differently from the jury selected in all other cases is not based upon any scientific determination. It is contrary to all other determinations by the court relative to similar areas. The presumption is therefore "irrational and arbitrary and hence unconstitutional."

The "unfairness" of permitting the introduction of the hearsay testimony is great in the instant case due to certain unique facts, to-wit: (1) approximately all of the testimony concerned acts and statements of Cosentino, (2) Cosentino did not defend on said facts, having been severed due to incompetence, (3) Cosentino was not available for cross examination. Hence, there exists the very circumstance held to be most prejudicial, i.e., defendant being denied the right to cross examination relative to extremely damaging statements of co-defendant. In *Bruton,* Justice Stewart, in his concurring opinion, (391 U.S. 137, 138) states:

> "I join the opinion and judgment of the Court. Although I did not agree with the decision in *Jackson* v. *Denno,* 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774, 1 ALR 3d 1205 (see id., at 427, 12 L. Ed. 2d at 945, 1 ALR 3d 1205), I accept its holding and share the Court's conclusion that it compels the overruling of *Delli Paoli* v. *United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294.
>
> "Quite apart from *Jackson* v. *Denno,* however, I think it clear that the underlying rationale of the Sixth

> Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a co-defendant, who is not subject to cross examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay (see, e.g., *Pointer* v. *Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065; *Douglas* v. *Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. See the Court's opinion, ante at 485, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth. Even if I did not consider *Jackson* v. *Denno* controlling, therefore, I would still agree that *Delli Paoli* must be overruled."

There is no rational basis for distinguishing the mental ability of jurors in conspiracy cases from their ability in other cases. The judicial presumption that the jury could remove from its mind the highly prejudicial hearsay is arbitrary and therefore unconstitutional.

The court should grant certiorari in accordance with the grant of certiorari in *Bostic* v. *United States, supra.*

2. Petitioners were denied their Sixth Amendment right to confront the witness Kay, by the Court holding that such witness could invoke his Fifth Amendment right against self incrimination to limit cross-examination concerning his interest, bias, and whether he had at a prior time purposely committed perjury.

Kay was the crucial government witness. The court improperly limited defendant's constitutional right to cross-examine government witness, Kay. The court (1)

prevented the defense from demonstrating that Kay was willing to commit perjury and had in fact committed perjury; (2) limited examination tending to show Kay's need to please the government, in order to avoid his otherwise assured conviction of crimes involving periods of substantial incarceration.

At trial, counsel for defendants were prevented from demonstrating that Kay was a perjurer.

By Mr. Callaghan:

Q. Now, Mr. Kaczinski (Kay), the case in which you are indicted charges you in three counts, does it not, the income tax violation?

A. I believe that's correct.

Q. Sir?

A. I said I believe that's correct.

Q. And it charges you in each one of those counts with having, in three separate years, filed a false and fraudulent income tax return, does it not?

A. It probably does.

Q. Now, when you signed those income tax returns, you knew that any false statements in those returns was subject to the penalties of perjury, didn't you?

Mr. Weber: Objection.

The Court: I will sustain the objection.

By Mr. Callaghan:

Q. Did you knowingly and fraudulently file a false income tax return?

Mr. Weber: Your Honor, I will object. The fact that he has been indicted is brought out, and that's as far as we can go. (Tr. 1492).

* * *

The Court: The objection will be sustained.

Mr. Callaghan: Did he know he was subject to the penalties of perjury at the time he signed them?

The Court: The objection is sustained, because it assumes that he filed, and all we have here is a charge pending against this man, and I will not permit you to go into it.

Mr. Callaghan: This goes to his motive for testifying. (Tr. 1497)

The limitation of cross-examination was improper. In *United States* v. *Lawinski,* 7 Cir. 195 F.2d at p. 7, the court said:

> "We recognize that it is of the essence of a fair trial that reasonable latitude be extended to the cross-examiner, and that prejudice may ensue from a denial of the opportunity to place a witness in his proper setting and put the weight of his testimony and his credibility to a test. Alford v. United States, 282 U.S. 687, 51 S. Ct. 218, 75 L.Ed. 624."

In *Gordon* v. *United States,* 344 U.S. 414, 423, the court held that while judges have a wide latitude in controlling cross-examinations,

> "this principle cannot be expanded to justify the curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony."

That a witness is a willing perjurer is clearly very material to the credence to be given to his testimony. That a witness is a perjurer is the most important fact about the witness. Defense counsel has a right to demonstrate that fact which is far more persuasive than that he has merely been indicted for perjury. In *United States* v. *Varelli,* 7 Cir. 407 F.2d 735 the court considered the

limitations placed upon cross-examination of a government witness relevant to his being a "perjurer or a suborner of perjury." The court stated:

> "Schang's credibility may be attacked by extrinsic evidence or by cross-examination. The introduction of extrinsic evidence has been limited to prior convictions for various reasons. However, such restriction does not apply to the extraction of the facts of misconduct from the witness himself upon cross-examination. 3 Wigmore on Evidence at 547 (3rd Ed. 1940), subject to the exceptions for relevancy and self-incrimination. Since perjury would be relevant to the witness' veracity, cross-examination should be allowed on retrial."

Preventing defendant's counsel from demonstrating by cross-examination that Kay was a willing perjurer was error.

The cross-examiner also attempted to demonstrate that the witness was guilty of trying to sell and transport certain government bonds for which the witness was indicted. The court held that counsel could demonstrate the indictment, but not his actual guilt. The following occurred:

> Q. Well, did you transport in interstate commerce a $100,000 stolen bond, knowing it to have been stolen?
>
> Mr. Weber: Objection.
>
> The Court: Again, Mr. Callaghan, it is the same type of question I ruled upon in the side bar conference, and I will sustain the objection. (Tr. 1514-5)
>
> * * *
>
> Q. And is part of your testimony that you have given in this lawsuit predicated upon helping yourself in that situation with the troubles that you have?
>
> A. No idea, sir.

Q. That is, you are not testifying in this lawsuit with any desire to get yourself out of your income tax case or this stolen bond case?

A. That is correct.

Q. Did you ever try to sell that $100,000 bond?

Mr. Weber: Objection.

The Court: The objection is sustained. (Tr. 1516)

• • •

Q. Well, did you ever ask anybody to tell an untruth about that bond to the agents of the Federal Bureau of Investigation?

Mr. Weber: Objection, your Honor.

The Court: The objection is sustained. (Tr. 1517)

Showing interest or bias on the part of a witness is an accepted method of impeachment, and even in jurisdictions where evidence of arrest or indictment is not ordinarily admissible to impeach credibility generally, the fact that a witness has been arrested or charged with a crime may be shown or inquired into where it would reasonably tend to show that his testimony might be influenced by interest, bias or a motive to testify falsely.

In *Alford* v. *United States,* 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624, it was held that a witness for the government might properly be asked on cross-examination, "Where do you live," even though the purpose of the inquiry was to bring out the fact that he was in court in custody of Federal authorities. The question was held proper as bearing on the question whether his testimony was biased because given under promise or expectation of immunity or under the coercive effect of his detention by such authorities. In holding that the defendant has the right to inquire into the matter of the witness' detention for the purpose of showing bias the Supreme Court stated p. 693:

> "The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop that his testimony was biased because given under promise or expectation of immunity or under the coercive effect of his detention."

Such evidence is so crucial that permitting a witness to mislead the jury as to his bias has been held to violate due process. In *Napue* v. *Illinois*, 360 U.S. 264, 3 L.Ed. 2d 1217, the court said, p. 268, that it was established that the Fourteenth Amendment to the Federal Constitution nullifies a criminal conviction obtained in whole or in part by testimony of a witness whose interest in the outcome of the trial has been falsely represented to the jury where such interest may affect his credibility.

The Court of Appeals held that such limitation of cross-examination was proper because the witness was able to invoke his Fifth Amendment privileges against self-incrimination in regard to his criminal activity. The court stated:

> First, the district judge sustained the Government's objection as to whether Kay was guilty of filing false income tax returns. The defense was permitted to show that there was a pending indictment against Kay with respect to filing a false income tax return, thus permitting defendant to attack his credibility. As we noted in United States v. Varelli, 407 F.2d 735, 751 (7th Cir. 1969), *cross-examination on such matters is subject to a self-incrimination exception, so that the court's ruling was correct.*
>
> • • •
>
> Kay denied that he was testifying in the present lawsuit in order to be freed of the income tax and stolen bond charges, and the jury was entitled to credit

his denial. The strictures of *Varelli* and similar cases dealing with the scope of cross-examination were abundantly satisfied.

This ruling of the Court of Appeals is in direct conflict with the court's holding in *Harris* v. *New York*, ... U.S. ....., 8 Cr L 3139. There the court held that the 5th Amendment cannot protect a witness from being impeached upon cross-examination. The court stated:

* * *

"* * * Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See *United States* v. *Knox*, 396 U.S. 77 (1969); cf. *Dennis* v. *United States*, 384 U. S. 855 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process."

The rule of this court announced in *Harris* is that a witness having once subjected himself to cross examination by choosing to testify cannot use the 5th Amendment protection as a shield against his perjury. "Having voluntarily taken the stand [the witness] Kay, was under an obligation to speak truthfully and accurately and the [defense had the right to] utilize the traditional truth testing process," by showing the interest of the witness. The limitation of cross examination was in violation of the right of confrontation as regulated by this court's opinions in *Alford* v. *United States*, 282 U.S. 687 and *Harris* v. *New York*, *supra*.

3. The conviction of petitioner Jasinski was in violation of his Sixth Amendment right of confrontation as a result of accusations admitted pursuant to the conspiracy exception of the hearsay rule.

As with defendant Aloisio, the jury was permitted to convict upon evidence which normally would not be admissible (and the basis for reversible error, if admitted) but here deemed appropriate pursuant to the unique rules of evidence applicable in conspiracy prosecutions. The conviction was therefore in violation of defendant's constitutional right of confrontation. (Point I of this petition is hereby adopted as to this argument).

4. The determination of probable cause to arrest by the Court of Appeals, absent a full determination of this issue at a trial evidentiary hearing, the issue of the constitutionality of defendant's arrest becoming relevant only after trial due to an interceding opinion of the Court in Davis v. Mississippi 394 U.S. 721, is in violation of the principles announced in Morales v. New York 396 U.S. 102 (1969).

The most crucial, persuasive evidence against defendant Jasinski was that his thumb print was on the back of a magazine used to carry a counterfeit bond. (Tr. 555). The print on the magazine, Exhibit 16-A, was compared to a print Exhibit 17B taken from defendant as a result of his arrest on January 22, 1968. (Tr. 531, 561).

His arrest at that time was without probable cause. He was merely sitting in a car parked in a lot outside a motel. The lack of probable cause for his arrest is evident from the fact that the complaint against him before the commissioner was dismissed. (Tr. 1287).

The fingerprints obtained from defendant as a result of his arrest on January 22, were the direct fruits of the illegal arrest. (Tr. 531). The use of such prints for comparison to a print found on the magazine was a violation of defendant's constitutional rights, protected by the Fourth Amendment to the Constitution.

In *Davis* v. *Mississippi*, 394 U.S. 721, the Supreme Court rejected the contention that prints taken from a defendant are not subject to the Fourth Amendment protection and reversed a conviction where testimony comparing prints found at the scene of a crime were identified as being from the defendant where such comparison was based on prints obtained from defendant while he was arrested without probable cause. The court reversed, even though there existed other substantial evidence of defendant's guilt, i.e. the identification testimony of the victim and the confession of the defendant.

An objection at trial based on the unconstitutionality of defendant's arrest was not raised to the admission of such prints. In the Court of Appeals it was asserted that the failure to raise such argument in pretrial motions to suppress does not waive defendant's constitutional right where the decision upon which defendant relies, namely *Davis* v. *Mississippi*, 394 U.S. 721, was not rendered until April 22, 1969, the date of argument to the jury in said cause (Tr. (1893). Counsel in the Court of Appeals relied upon this court's prior rulings in *O'Conner* v. *Ohio*, 385 U.S. 92; *Curtis* v. *Butts*, 388 U.S. 130; *Crosso* v. *United States*, 390 U.S. 62, all of which held that a defendant may raise, subsequent to trial, a denial of a constitutional right which was not raised due to reliance on prior constitutional decisions, deviated from, since the trial. The court of

appeals considered the constitutionality of defendant's arrest, thereby adopting the position of appellant that no waiver occurred.

The court of appeals held that probable cause to arrest defendant existed. The court stated:

> "Even though the complaint against Jasinski was dismissed before his indictment, this record shows that there was probable cause for his January 22nd arrest. On the morning of January 22, in Agent Gibbs' room at the Chicago Airway Motel, Solomon and Mrs. Cosentino told Gibbs that they had two "partners" across the street covering the action, and Gibbs shortly thereafter so advised Agent Cozza. In turn, he communicated by radio to Agent Tucker on the street. Tucker told Cozza that Jasinski and Aloisio had been in the parking lot for half an hour seated in a car with the motor running and observing the motel. Theirs was the only car in the parking lot with anyone inside. Because of the information communicated to Gibbs by Mrs. Cosentino and Solomon, and because of Aloisio's and Jasinski's suspicious behavior on the motel parking lot, Tucker had probable cause to arrest them that morning. Therefore Davis v. Mississippi, 394 U.S. 291, and Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958), do not require the suppression of the fingerprints."

The opinion of the court of appeals is erroneous.

As the record stands and as the Government once admitted by having the complaint before the commissioner dismissed, no probable cause for Jasinski's arrest existed. Defendant was merely in a car and although this was somewhat a verification of Cosentino's statement, the verification of such innocuous details of innocent conduct does not rise to the level of probable cause. Certainly no arrest warrant could have been obtained based on agents' obser-

vation of Jasinski in a car. In *Spinelli* v. *United States*, 393 U.S. 410, 21 L Ed 637, the court stated that the facts verified contained "no suggestion of criminal conduct when taken by themselves and they are not endowed with an aura of suspicion by virtue of the informer's tip." 21 L Ed 2d 637 at 645. Here too, Jasinski's innocent conduct was not "endowed with an aura of suspicion by virtue of the Cosentino's unspecific reference to "two partners." (It should be noted that no prior references to Jasinski were made by either Cosentino or any witness at trial; indeed, not even Cosentino mentioned Jasinski's name.) Although agents may have been acting in good faith, upon their suspicions, such good faith suspicion not based upon facts sufficient to obtain a warrant or support a complaint and does not rise to the level of probable cause. *Beck* v. *Ohio*, 379 U.S. 89, *United States* v. *Henry*, 361 U.S. 98; *Sibron* v. *New York*, 392 U.S. 41.

Even assuming the court may deem the facts of record to be sufficient probable cause, prior to any affirmance, this cause must be reversed for a full evidentiary hearing on such issue. Here, no motion to suppress was filed due to the status of the law prior to this court's decision in *Davis* v. *Mississippi* and due to the change caused by *Davis*, no waiver of 4th Amendment rights occurred. *O'Conner* v. *Ohio*, 385 U.S. 92. Hence, prior to the admission of such evidence, where there exists at least a prima facia indication that the arrest was without probable cause, to-wit: the government caused the complaint against defendant to be dismissed before the commissioner, there should be a full evidentiary hearing on the constitutionality of the arrest pursuant to this court's decision. *Morales* v. *New York*, 396 U.S. 102. In *Morales*, as here, the unconstitutionality of defendant's arrest became an issue only sub-

sequent to trial and a full evidentiary hearing was not held in the trial court. The court remanded for a hearing, finding the facts of the record insufficient upon which to make a decision. So in this case, there was no hearing on the probable cause for the arrest of defendant and, as in *Morales,* there should be a full evidentiary hearing. This cause should therefore be reversed for such a limited hearing, pursuant to *Jackson* v. *Denno,* 378 U.S. 368.

Conclusion

For the reasons urged herein, it is respectfully requested that Petitioners' request for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

Nos. 17799-17802

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM ALOISIO, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 10, 1971

Before SWYGERT, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and CUMMINGS, Circuit Judge.

CUMMINGS, *Circuit Judge.* In July 1968 the four appellants and four others were indicted for conspiring to counterfeit United States Treasury Notes in the northern district of Illinois, commencing on September 1967, in violation of the general conspiracy provision found in 18

U.S.C. § 371. Bartoli was also charged in Count Two with forging 99 counterfeit United States Treasury Notes in Rockford, Illinois, in January 1968, in violation of 18 U.S.C. § 471. In Count Seven, he was charged with having a counterfeit $10,000 Treasury Note in his possession on January 20, 1968, in Chicago, intending to sell it, in violation of 18 U.S.C. § 474. Jasinski was also charged with having the same Treasury Note in his possession in Chicago on January 16, intending to sell it, in violation of the same provision. Aloisio, Jasinski, and Solomon were named in three other counts concerning actions with respect to the 99 counterfeit $10,000 Treasury Notes, allegedly violating 18 U.S.C. §§ 472, 473, and 474. After a jury trial, the four appellants were found guilty as charged. Solomon and Bartoli received 10-year concurrent sentences on the substantive counts and five-year concurrent sentences on the conspiracy count; Aloisio and Jasinski received 5-year concurrent sentences. Having considered the various grounds urged for reversal, we affirm.

I. *The Validity of the Indictment.*

A. Use of Hearsay Evidence.

Defendants first challenge the validity of the indictment against them on the ground that it was based "largely if not wholly" upon hearsay testimony.

In *Costello* v. *United States,* 350 U.S. 359, the Supreme Court categorically refused to invalidate an indictment based upon hearsay evidence under either the Fifth Amendment or its supervisory powers over federal courts. This Court has repeatedly rejected similar attacks upon the quality of evidence relied upon by grand juries. See, *e.g., United States* v. *Daddano,* 432 F.2d 1119, 1125 (7th

Cir. 1970); *United States* v. *Braico,* 422 F.2d 543, 545 (7th Cir. 1970). Nor is there any suggestion in this case that the "integrity of the judicial process" is jeopardized by the manner in which the Grand Jury reached its determination. See *United States* v. *Leibowitz,* 420 F.2d 39, 42 (2d Cir. 1969).

B. Failure to Preserve Testimony.

Defendants next ask that the indictment be dismissed because the Government failed to record and preserve the testimony of witnesses before the Grand Jury. They argue that such a requirement is necessary in order to implement the right of a defendant to access to a witness' grand jury testimony on subjects about which he subsequently testifies at trial. See *United States* v. *Amabile,* 395 F.2d 47, 53 (7th Cir. 1968), certiorari denied, 39 U.S.L.W. 3361.

The basic rules relating to federal grand juries are set forth in Rule 6 of the Federal Rules of Criminal Procedure. Rule 6(d) presently permits, but does not demand, the presence of a stenographer for the purpose of recording evidence. This approach, though justifiably criticized on several grounds, has nevertheless been uniformly observed by other Circuits. See *Schlinsky* v. *United States,* 379 F.2d 735, 740 (1st Cir. 1967); *United States* v. *Cianchetti,* 315 F.2d 584, 591 (2d Cir. 1963); *United States* v. *Kind,* 433 F.2d 339, 340 (4th Cir. 1970); *Baker* v. *United States,* 412 F.2d 1069, 1073 (5th Cir. 1969), certiorari denied, 396 U.S. 1018; *United States* v. *Hensley,* 374 F.2d 341, 352 (6th Cir. 1967); *United States* v. *Franklin,* 429 F.2d 274, 276 (8th Cir. 1970); *United States* v. *Ybarra,* 430 F.2d 1230, 1233 (9th Cir. 1970); *McCaffrey* v. *United States,* 372 F.2d 482, 484 (10th Cir. 1967), certiorari

denied, 387 U.S. 945.[1] While we agree that the preservation of grand jury testimony is the wise practice, we are presently unwilling to bind the various district courts of this Circuit to such a practice. Rather, we will rely upon the individual district courts to exercise their local rule-making powers in this area pending any amendment to Rule 6(e) of the Federal Rules of Criminal Procedure.[2]

II. *Sufficiency of the Evidence as to Aloisio and Jasinski.*

A. Aloisio

At the inception of the conspiracy in August 1967, defendant Grace Cosentino, whose trial was severed, told informer Ted Kay that she and her partners were planning to counterfeit United States government securities,

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[1] The American Bar Association's Special Committee on Federal Rules of Procedure has, for the second time, recommended to the Supreme Court's Advisory Committee an amendment to Rule 6(e) of the Federal Rules of Criminal Procedure, which would mandate recording of all testimony before an accusatorial grand jury. 51 F.R.D. ....., ... ; see also 38 F.R.D. 95, 106.

[2] Commendably, the United States District Court for the Northern District of Illinois has already adopted an appropriate rule to that effect:

> Local Rule 1.04(c). *Official Reporter to Attend Sessions of the Grand Jury.* An official Reporter of this Court shall attend and record all testimony of witnesses appearing before every Grand Jury. Such record shall be filed with the Clerk of the Court and transcribed and released to the Court upon order or to the United States Attorney upon request and payment of the appropriate fees to the Official Reporter.

See *United States* v. *Gramolini*, 301 F.Supp. 39 (D. R.I. 1969), for a perceptive study of this problem.

and that she and her boy-friend "Smokes," later identified as Aloisio, were going to supply an unidentified banker friend with $1,500,000 worth of such securities. On January 11, 1968, she told Kay that she and "Smokes" were all set with such securities for their banker friend. Kay agreed to supply her with a purchaser for some of the counterfeit Treasury Notes. Mrs. Cosentino agreed to have "Smokes" or Solomon present at the time of delivery to protect the proposed deal. Five days later, she reiterated to Kay and Agent Gibbs that Solomon or "Smokes" would be present at the closing to protect all parties. Gibbs expressed some suspicion of "Smokes," but Mrs. Cosentino assured him that "Smokes" knew of the counterfeiting venture and could be trusted.

On the evening of January 17, Aloisio phoned Mrs. Cosentino's home from a restaurant and lounge at 1202 West Grand Avenue, Chicago. He told Mrs. Cosentino's daughter, Antonia, to call her mother and have her call him at HA 1-8760. Antonia relayed this message to her mother who was then in Agent Gibbs' room in the Chicago Airways Motel. Mrs. Cosentino told Gibbs that her close friend "Smokes" was concerned about her and had just asked her, through Antonia, to call him at HA 1-8760. Mrs. Cosentino tried that number and received a busy signal. Thereafter, Aloisio again telephoned Antonia and told her that he had not yet heard from Mrs. Cosentino. Antonia then called her mother again, and Mrs. Cosentino told Gibbs that "Smokes" had called again and was concerned about her.

Thereafter, Mrs. Cosentino called HA 1-8760 from Gibbs' room. He overheard her say that "she was with the man [Gibbs] at the motel room at that time, and was

talking to him about the deal, and told this individual [Aloisio] that he had nothing to worry about; that I [Gibbs] was a gentleman, and she didn't see where anything could go wrong and told him not to worry." She also asked him where he was going to be later and told him that she would see him later that day. After she hung up, she told Gibbs "that was her friend Smokes who was very concerned about her." She stated that "he felt that the deal she was entering into with me [Gibbs] might be a setup, and that because he was such a close friend he was concerned about her welfare and didn't want her to get into any trouble." Over objection the foregoing testimony was admitted into evidence. It indicates that Aloisio was involved in the conspiracy as early as August 1967. Moreover, his telephone conversation with Mrs. Cosentino revealed his knowledge of the conspiracy and his concern for its success.

Through Antonia Cosentino and the telephone number testimony, the Government showed that Aloisio was the person to whom Mrs. Cosentino was talking from Gibbs' motel room. Accordingly, the testimony of Mrs. Cosentino's conversation with Aloisio was competent (*United States* v. *Bucur*, 194 F.2d 297, 304 (7th Cir. 1952)) and evidenced a conspiracy in which Aloisio was involved. The remainder of Mrs. Cosentino's statement to Gibbs was also admissible against Aloisio as a statement of a co-conspirator in furtherance of the conspiracy. Aloisio's January 22 appearance with Jasinski outside the motel, surveying the motel for about 30 minutes with the car motor on, corroborated Mrs. Cosentino's and Solomon's statements to Gibbs that morning that they had partners across the street covering the deal. We conclude that

there was ample evidence to link Aloisio with this conspiracy and to make him an aider and abettor as to the three substantive counts in which he was named.

B. Jasinski

On January 22, 1968, when Solomon and Mrs. Cosentino were delivering $1,000,000 in counterfeit Treasury Notes to Agent Gibbs in his motel room, they told Gibbs that two of their partners were across the street from the motel in an automobile for the protection of all concerned. At the same time, Agent Tucker had observed Jasinski and Aloisio watching the motel for about 30 minutes from their parked car with the motor on. Mrs. Cosentino's and Solomon's remarks to Gibbs clearly linked Jasinski and Aloisio to the scheme. Jasinski was also linked by his right thumbprint found on a "Saturday Evening Post" covering a sample of the counterfeit Treasury Notes that Mrs. Cosentino delivered to Gibbs on January 16. Since the conspiracy had already been established, this evidence, viewed in the light most favorable to the Government, sufficed to connect Jasinski with the conspiracy. The evidence also established his culpability as an aider and abettor of the commission of the substantive offenses with which he was charged.

III. *The Constitutionality of the Identification of Aloisio.*

Ted Kay, an unindicted coconspirator, began to cooperate with the Government in this investigation in September 1967. He, Solomon, and Mrs. Cosentino were arrested in Agent Gibbs' room at the Chicago Airways Motel on the morning of January 22, 1968. The Government has advised us that informer Kay was taken to the United States Marshal's lockup along with the other defendants for his own protection. At 11:00 a.m. in the

lockup, before being placed in a cell, Kay was with "some of the defendants" and John Varelli. In response to a question as to what Varelli said to Aloisio, Kay replied:

> "Well, the best as I can recall, I remember him [Varelli] saying, 'Hi, Smokes.' And Smokes spoke back to him in Italian. I could understand a couple of the words, but I didn't recall the whole conversation. In Italian, he [Aloisio] said not to say anything."

Relying upon *Massiah* v. *United States*, 377 U.S. 201, defendant Aloisio now asserts that Kay's identification of him as "Smokes" should not have been admitted because *the conversation* occurred in the federal lockup after his arrest without benefit of counsel.[3] We disagree.

The defendants did not show that the purpose of placing Kay in the cell in the Marshal's lockup was to obtain information for this case. Kay himself testified that the Secret Service did not tell him to overhear what might be said in the Marshal's office or in the lockup cells. He was placed in a cell by himself and had no idea how many people were in the adjoining cell except that Varelli was in it during part of the hour that Kay remained in his cell. The transcript does not reveal that Kay heard any conversations from other cells. Kay's subterfuge of being a codefendant had already been pierced, for, while standing in the lockup hallway with other apprehended persons, Aloisio saw Solomon kick Kay in the groin and later admonished Varelli in Italian "not to say anything." Kay was not placed in the lockup to elicit admissions, nor was Varelli's knowledge of Aloisio as "Smokes" de-

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[3] This objection was not made at the trial but will be considered in view of its constitutional nature. *Silber* v. *United States*, 370 U.S. 717 (*per curiam*).

liberately elicited. In these circumstances, the admission into evidence of the volunteered statement of a non-defendant clearly did not vitiate Aloisio's conviction. *United States ex rel. Milani* v. *Pate,* 425 F.2d 6 (7th Cir. 1970); *United States ex rel. Baldwin* v. *Yeager,* 421 F.2d 182, 184 (3d Cir. 1970); *United States* v. *De Leo,* 422 F.2d 487, 496 (1st Cir. 1970), certiorari denied, 397 U.S. 1037; *United States* v. *Mitchell,* 417 F.2d 1246, 1249 (7th Cir. 1969); *United States* v. *Fioravanti,* 412 F.2d 407, 413 (3d Cir. 1969), certiorari denied, 396 U.S. 837; cf. *Miller* v. *Carter,* 434 F.2d 824, 825 (9th Cir. 1970).

IV. *The Suppression of Fingerprints.*

Defendant Jasinski urges that the fingerprints obtained from him after his January 22, 1968, arrest were subject to Fourth Amendment protection because his arrest was without probable cause. This objection was not made at the trial but may be considered here under Rule 52(b) of the Federal Rules of Criminal Procedure.

Even though the complaint against Jasinski was dismissed before his indictment, this record shows that there was probable cause for his January 22nd arrest. On the morning of January 22, in Agent Gibbs' room at the Chicago Airway Motel, Solomon and Mrs. Cosentino told Gibbs that they had two "partners" across the street covering the action, and Gibbs shortly thereafter so advised Agent Cozza. In turn, he communicated by radio to Agent Tucker on the street. Tucker told Cozza that Jasinski and Aloisio had been in the parking lot for half an hour seated in a car with the motor running and observing the motel. Theirs was the only car in the parking lot with anyone inside. Because of the information communicated to Gibbs by Mrs. Cosentino and Solomon,

and because Aloisio's and Jasinski's suspicious behavior on the motel parking lot, Tucker had probable cause to arrest them that morning. Therefore *Davis* v. *Mississippi,* 394 U.S. 291, and *Bynum* v. *United States,* 262 F.2d 465 (D.C. Cir. 1958), do not require the suppression of the fingerprints.

V. *Improper Reference to Photographs.*

Defendants Aloisio and Bartoli contend that they were denied a fair trial because references to their so-called "mug shots" informed the jury of their prior criminal records. We have carefully studied the three brief passages in the transcript concerning these photographs and note that the references were not elicited by the Government but occurred in cross-examination by defense counsel. Although the testimony revealed that the photographs were seen by Agents Sheriff and Tucker in the Chicago office of the Secret Service, they were merely described as bust photos with their names written on the reverse sides. The evidence did not disclose that these were "mug shots" or contained police numbers thereon, nor was there any mention of prior criminal activities of these two defendants. No reversible error resulted from the innocuous comments concerning the two photographs. *United States* v. *Robinson,* 406 F.2d 64, 66 (7th Cir. 1969); *United States* v. *Schwartz,* 398 F.2d 464, 470 (7th Cir. 1969).

VI. *Examination of Agent Tucker.*

Aloisio urges that reversal is required because of the following question asked by an Assistant United States Attorney:

> "By Mr. Weber:
> Q. Agent Tucker, going back to January 17th at 9:00 p.m., in the vicinity of Grace Cosentino's house, what if any information did you have as to whether Mr. Aloisio was there on business or on pleasure?

Mr. Callaghan: Oh, objection.

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The Court: The objection is sustained.
Mr. Weber: I have no further questions."

Aloisio's defense was that he was merely a social friend of Mrs. Cosentino. However, the Government was entitled to question that defense by asking Agent Tucker whether he had information that Aloisio's visit was indeed for business purposes, and government counsel was careful to phrase his question in the alternative. In any event, Aloisio's argument must fail, since the objection was sustained and the jury was instructed that it was to consider only properly admitted evidence.

VII. *Entrapment Instructions.*

Solomon contends that the trial judge should have given three proffered entrapment instructions. However, the evidence does not reveal that any government agent induced Solomon to commit this offense. In fact, on January 18, 1968, informer Kay offered Solomon an opportunity to avoid participation. The trial court was correct in ruling that there was no evidence of entrapment, so that entrapment instructions were inapposite.

VIII. *Comment on Defendants' Failure to Testify.*

Solomon and Aloisio assert that Agent Gibbs commented on their failure to testify. During his cross-examination by defendant Solomon, Gibbs was asked whether he was wearing his "mickey mouse" watch when he met Solomon on January 18, and Gibbs replied, "You will have to put on one of your clients to determine that conclusion." No objection was made to this answer. The exchange occurred during the Government's case, when

it was not known whether or not Solomon would take the stand. We do not view the remark as a comment on Solomon's failure to testify.[4] Moreover, the jury was properly instructed that a defendant has the right not to testify and not to draw any inference against him because of a failure to do so.

IX. *Cross-Examination of Informer Kay.*

Aloisio asserts that the defendants' rights were denied by the limitation of the cross-examination of informer Kay in three particular instances.

First, the district judge sustained the Government's objection as to whether Kay was guilty of filing false income tax returns. The defense was permitted to show that there was a pending indictment against Kay with respect to filing a false income tax return, thus permitting defendant to attack his credibility. As we noted in *United States* v. *Varelli*, 407 F.2d 735, 751 (7th Cir. 1969), cross-examination on such matters is subject to a self-incrimination exception, so that the court's ruling was correct.

Because of Kay's Fifth Amendment rights, the district judge also properly sustained an objection as to whether Kay had transported a $100,000 bond in interstate commerce. Again counsel was permitted to demonstrate Kay's indictment for that offense as affecting his credibility.

In a belated attempt to show that the Government posted the informer's bond, Aloisio urges that Kay should have been permitted to say who put up his $50,000 bond. In light of the extensive examination of the witness on

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[4] *United States* v. *Blassick*, 422 F.2d 652, 654 (7th Cir. 1970).

all other possible links with the prosecution, if still questioned, the district court's ruling that the question of the source of bond money was irrelevant was not an abuse of discretion. Moreover, Aloisio's own counsel's closing argument indicated that Kay's mother raised the money.

Our examination of the voluminous cross-examination of witness Kay convinces us that extremely broad latitude was allowed defense counsel. They were given great freedom in their efforts to show that Kay was a biased perjuror with obligations to the Government, and that his testimony had been "bought" by the Secret Service. His unsavory background was thoroughly explored by defense counsel. Kay denied that he was testifying in the present lawsuit in order to be freed of the income tax and stolen bond charges, and the jury was entitled to credit his denial. The strictures of *Varelli* and similar cases dealing with the scope of cross-examination were abundantly satisfied.

X. *The Prosecutor's Closing Argument.*

Aloisio and Bartoli assail the prosecutor's closing argument to the effect that (1) Kay's testimony was so well corroborated by Secret Service agents that the jury would have to disbelieve the prosecutor and agents if it disbelieved Kay, (2) it was not the Government's intention to send innocent men to the penitentiary, and (3) the Government was standing by its agents. These remarks are rather typical of the highflown rhetoric used in closing arguments by both sides. The prosecutor was not impermissibly speaking of facts outside the record or within his own personal knowledge. In the context of his closing, he was referring to what was in the record and rebutting the attack of the defense on the integrity of the prosecution, including "the manufacturing of crime."

The comments of government counsel were quite clearly provoked by the vigorous defense and do not merit reversal. *Long* v. *United States*, 355 U.S. 339, 359-360, note 16; *United States* v. *Battiato*, 204 F.2d 717, 719 (7th Cir. 1953).

The judgments are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 9, 1971

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Nos. 17801, 17802 vs.

WILLIAM ALOISIO and STANLEY JASINSKI,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER

On consideration of the petition for rehearing *en banc*, and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, IT IS ORDERED that said petition be denied.